



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 20, 1989

Honorable Charles W. Chapman
Criminal District Attorney
Hays County Courthouse, Suite 208
San Marcos, Texas 78666

LO-89-51

Dear Mr. Chapman:

You ask this office to advise you about the responsibility for service of summons issued by a justice of the peace in criminal cases.

Article 23.04 of the Code of Criminal Procedure provides:

In misdemeanor cases the capias or summons shall issue from a court having jurisdiction of the case. The summons shall be issued only upon request of the attorney representing the State and shall follow the same form and procedure as in a felony case. (Emphasis added.)

Justice of the peace courts have original jurisdiction in misdemeanor cases punishable by fine only. Tex. Const. art. V, § 19.

Article 23.03 of the Code of Criminal Procedure provides for the issuance and service of summons in felony cases. Article 23.03 states

(a) A capias shall be issued by the district clerk upon each indictment for felony presented, after bail has been set or denied by the judge of the court. Upon the request of the attorney representing the State, a summons shall be issued by the district clerk. The capias or summons shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides or is to be found. A capias or

summons need not issue for a defendant in custody or under bond.

(b) Upon the request of the attorney representing the State a summons instead of a capias shall issue. If a defendant fails to appear in response to the summons a capias shall issue.

(c) Summons. The summons shall be in the same form as the capias except that it shall summon the defendant to appear before the proper court at a stated time and place. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address. (Emphasis added.)

Pursuant to article 23.04 the summons shall issue from a court having jurisdiction of the case only upon the request of the attorney representing the state. Article 23.03(a) provides that the summons shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides. There is no general statutory provision authorizing a clerk for the justice court. Summons in misdemeanors are authorized to be issued under article 23.04 in accordance with procedure in article 23.03. Since there is no general statutory provision for a clerk in justice court, we believe the reference to the clerk issuing the summons in article 23.03 can be read as referring to the justice himself issuing the summons from his court.¹

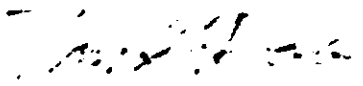
If a summons is mailed to a sheriff in accordance with article 23.03 or article 23.04, the sheriff has a responsibility to serve such summons, the sheriff has a duty to

1. In Attorney General Opinion JM-1029 (1989) it was stated that an abstract of judgment may be "properly authenticated" by the justice of the peace authenticating abstracts prepared by the justice.

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serve it. Local Gov't Code § 85.021. "[A]n inadequate operating budget will not excuse a sheriff's failure to execute process directed to him." Attorney General Opinion H-595 (1975).

Very truly yours,


Tom G. Davis
Assistant Attorney General
Opinion Committee

APPROVED: Sarah Woelk

TGD/SW/bc